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No. 93-1636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
Petitioners,
v.
CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CHAMBERS COUNTY COMMISSION

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

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QUESTION PRESENTED

Whether a county government is liable under § 1983 for a sheriff's law enforcement decisions, where state law does not vest law enforcement authority in the county government and makes the sheriff a state officer.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the essential attributes of state sovereignty is the prerogative to decide how to allocate governmental authority. *See Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991). As the Court noted in *Gregory*, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." *Id.* Among the most fundamental decisions for a State are those it makes regarding whether to vest a particular governmental authority (such as law enforcement) in an entity of local government or in state officials.

The court of appeals' decision correctly recognized that Alabama has not vested law enforcement authority in county governments and that Alabama's sheriffs are executive officers of the State. *See* Pet. App. 32a-34a. Chambers County, like most other county governments, has been granted only limited authority by the State. County governments' revenue raising powers are also commonly structured in accordance with the other powers which they have been granted. Indeed, in several respects, Chambers County, with its limited population (36,876 people, *see 1992 County and City Extra—Annual Metro, City and County Data Book* 36 (Courtenay M. Slater & George E. Hall eds. 1992)) and revenues ($6 million in the fiscal year ending September 30, 1993, *see* State Of

Alabama, Department of Examiners of Public Accounts, *Financial Statement: All Counties* 24 (1994)), is typical of this nation's counties. Of the nation's 3,042 county governments, three-fourths have a population of less than 50,000 and more than half have a population of less than 25,000. 4 U.S. Department of Commerce, Bureau of the Census, *1987 Census of Governments* 26 (Table 12) (1990). Budgets for these county governments are extremely limited. As reported by the Census Bureau, the average annual own source revenue (i.e., revenue from taxes and user fees) for county governments is $5.07 million for counties with a population of less than 50,000 people and $3.66 million for counties with less than 25,000 people. *Id.*

Given the limited fiscal resources of most county governments, the adoption of petitioners' criteria for imposing liability has potentially grave consequences for counties and their ability to provide essential services to their citizens. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt respondent's statement.

SUMMARY OF ARGUMENT

1. In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments are suable as "persons" under § 1983. In doing so, the Court relied principally on the common law understanding that the corporation was an artificial person and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). This common law understanding recognized, however, that corporations possessed only

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

those powers conferred on them by their charters. As the Court noted in *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870), "[t]he chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter."

This principle applied as well to municipal corporations. *See* John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As a general rule, municipal corporations were not liable when their officers acted "outside of the powers of the corporation." *Id.* § 767, at 725. As the Court has recognized, the members of the Forty-Second Congress (which enacted § 1983) were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Accordingly, a local government is suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is likewise supported by the debate which culminated in the House of Representatives' rejection of the Sherman Amendment. Numerous representatives recognized that the Amendment, which proposed to provide a cause of action against local governments for failing to prevent riots and mobs acting with the intent to deprive citizens of their civil rights, was patently unfair because many local governments had not been granted the authority under state law to keep the peace. *See generally* Cong. Globe, 42d Cong., 1st Sess., 791-95 (1871). As the members of the Forty-Second Congress recognized, States are not required to vest law enforcement authority in county governments. Whether they have done so is a question which must be answered before answering the question of whether a particular official is a county's final policymaker.

As this Court has noted, one of the main functions of Alabama county governments "is to supervise and

control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 112 S.Ct. 820, 824 (1992). Alabama counties' other principal functions are largely limited to erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority, e.g., the method of selection, funding, and absence thus properly held that Chambers County was not liable for the sheriff's decisions under § 1983.

2. In challenging the court of appeals' holding that Chambers County could not be held liable for the sheriff's activities because it does not have law enforcement authority, petitioners argue that it is the common understanding that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law. Contrary to petitioners' suggestion, the sheriff, when acting as a conservator of the peace, has always been viewed as exercising "the sovereignty of the State." 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 6, at 5 (1941). Sheriffs were frequently constitutional officers of the State and remain so today in several States, including Alabama. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27. Sheriffs were commonly subject to removal from office through either the State's impeachment procedure or removal by the governor or both. Alabama follows this tradition by making its sheriffs members of the State's executive department and subjecting them to impeachment proceedings initiated by the Governor and adjudicated by the state Supreme Court. *See* Ala. Const. art. V, § 112; art. VII, §§ 173-74.

None of the criteria which petitioners and their *amici* rely upon to argue that the sheriff exercises county authority, e.g., the method of selection, funding, and absence of any county official who reviews the sheriff's decisions, alters the status of Alabama's sheriffs as constitutional officers of the State who, in enforcing state law, exercise state authority. At the time of § 1983's enactment, it

was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* 518 (1868). Nonetheless, it was the common understanding then as now, that the sheriff, as conservator of the peace, exercises the sovereign's authority. Likewise, the requirement that the county fund the sheriff's office does not alter this settled understanding. Historically, the sheriff was not financially supported by the sovereign but was still understood as exercising sovereign authority. Moreover, sheriffs are commonly assigned numerous duties, such as serving court process and subpoenas issued by state agencies and legislatures. *See, e.g.*, Ala. Code § 36-22-3(1). Adopting petitioners' view could result in the imposition of liability on the county for a sheriff's unconstitutional service of a state-issued subpoena even though the county has no authority with respect to such matters.

Finally, that Chambers County's board of commissioners does not have authority to review the sheriff's law enforcement decisions does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority and to make sheriffs constitutional officers of the State's executive department.[2]

ARGUMENT

A SHERIFF IS NOT A COUNTY POLICYMAKER FOR LAW ENFORCEMENT PURPOSES WHERE STATE LAW DOES NOT GRANT THE COUNTY LAW ENFORCEMENT AUTHORITY AND MAKES THE SHERIFF A STATE OFFICER

In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent it had held that local governments were not suable as "persons" under 42 U.S.C. § 1983. The Court, however, rejected the view that

[2] *Amici* note that sheriffs are suable under § 1983 in their individual capacities, as was done here. *See Kentucky v. Graham*, 473 U.S. 159 (1985).

§ 1983 imposes *respondeat superior* liability, holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. After consideration of § 1983's text and legislative history, the Court concluded that "Congress did not intend [local governments] to be held liable unless action pursuant to official [local government] policy of some nature caused a constitutional tort." *Id.* at 691. As the Court stated, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Relying on dictum in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986), petitioners and their *amici* argue that the sheriff of Chambers County is the County's final policymaker with respect to law enforcement authority notwithstanding that Alabama law does not vest the County with law enforcement authority. According to petitioners, liability can be imposed on the corporate entity of the County because "sheriffs are elected by the residents of their respective counties, . . . receive their salary and expenses from their respective counties . . . . [and] serve as the chief law enforcement officers in the counties inasmuch as their decisions are final and unreviewable within their counties and state law confers on them the duty to enforce the law 'in their respective counties.'" Pet. Br. 12-13 (citations omitted); *see also* Br. *Am. Cur.* United States 9 ("Because the county is required by state law to pay the sheriff and to fund all the operations of the sheriff's office, it is also clear that the county government is properly viewed as having authority in regard to county law enforcement activities for purposes of Section 1983.").

As *amici* explain below, the court of appeals' holding that Chambers County could not be sued under § 1983 because "the State has not assigned the counties any law enforcement authority" and "the sheriff [was] not exercising county power," Pet. App. 33a-34a, is manifestly correct as a matter of statutory construction. Indeed, the Forty-Second Congress expressly rejected the very form of liability which petitioners urge this court to impose—i.e., liability on the corporate entity of a local government when the State has not granted it authority to act. Likewise, petitioners' criteria for imposing liability do not establish the nature of the authority the sheriff exercises in enforcing state law. While sheriffs have frequently been called county officers, their duties involve the exercise of a wide variety of functions, many of which involve the exercise of state rather than county authority. Alabama merely follows the settled understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. Contrary to the suggestions of petitioners and their *amici*, when, as here, sheriffs exercise state authority, their acts cannot "fairly be said to represent" a local government's official policy so as to establish "that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. The Court should therefore reject petitioners' attempt to impose on respondent and its citizens the vicarious liability which the Court rejected in *Monell*.

A. A Local Government Cannot Be Sued Under § 1983 For Unconstitutional Policies When It Has No Authority To Make Such Policies

1. Section 1983 renders liable "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The court of appeals held that Chambers County was not suable under § 1983 because in the absence of the State having granted law enforcement authority to the County, the Sheriff could not be deemed to be "exercising county power." Pet. App. 34a. This holding is manifestly correct as a matter of statutory construction.

In *Monell*, this Court overruled its decision in *Monroe* to the extent the latter had held that a local government

was not suable as a "person" under § 1983. In concluding that § 1983's use of the term "person" included municipal corporations and local governments, the Court relied principally on the common law understanding of the nature of the corporation and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). But while by 1871, the corporation was treated as a natural person and citizen of a State for the purposes of establishing the diversity jurisdiction of the federal courts, *see id.* (citations omitted), the corporation was always recognized as being an artificial person with only those powers which were conferred on it by its charter. *See, e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Consistent with this understanding, the Court noted shortly before the enactment of § 1983:

> A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter.

Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65, 81 (1870); *see also Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659, 666-67 (1878) ("powers and immunities" of artificial person "depend primarily upon the law of its creation").

At the time of § 1983's enactment, it was likewise settled that municipal corporations "possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As Judge Dillon explained:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.

Id. § 55, at 101-02. *See also* Howard S. Abbott, *A Summary Of The Law Of Public Corporations* § 21, at 20-21 (1908) (A public corporation "takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community.").[3]

[3] A corollary of this principle is the *ultra vires* doctrine, which was also well established at the time of Section 1983's enactment. As Judge Dillon wrote in 1872:

> The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts.

Dillon, *The Law Of Municipal Corporations* § 767, at 725. *See also* 1 Charles F. Beach, Jr., *Commentaries On The Law Of Public Corporations* § 592, at 607-08 (1893) ("Acts of municipal corporations which are done without power expressly granted, or fairly

As the Court has recognized, the members of the Forty-Second Congress were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *see also Heck v. Humphrey*, 114 S.Ct. 2364, 2370-71 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989) (collecting cases). The Court has likewise noted that § 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Burns v. Reed*, 500 U.S. 478, 484 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Those principles demonstrate that under § 1983, local governmental entities act as "persons" only to the extent their putative officers and agents exercise powers which the State has granted to them. A local government is thus suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is also supported by the Forty-Second Congress' acknowledgment and endorsement of the common law principles applicable to municipal corporations in rejecting the conference committee's draft of the Sherman Amendment.[4] As the Court

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to be implied from the powers granted or incident to the purposes of their creation, are *ultra vires.*").

Today it is still the general rule that "in order to render a municipal corporation liable, the acts complained of must have been in the exercise of some power conferred on it by its charter or other positive enactment." 18 Eugene McQuillin, *The Law Of Municipal Corporations* § 53.60, at 379 (Stephen M. Flanagan ed.) (3d ed. 1984). Likewise, with respect to the torts of a municipal corporation's officers, it "is well settled that if the alleged tort is in connection with an act which is wholly ultra vires, i.e., beyond the scope of the power of the municipality, no liability for damages arises, as against the municipality." *Id.*

[4] The conference committee's draft of the Sherman Amendment provided a cause of action against local governments to persons injured by

> any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . .

Monell, 436 U.S. at 703 (quoting Cong. Globe, 42d Cong., 1st Sess., 749, 755 (1871)). This version not only rendered local governments liable but provided the injured person with collection remedies such as attachment, garnishment and mandamus against the local government itself. *Id.* at 703-04 (quoting Cong. Globe at 749, 755). The debate focused on this version, which was added in conference after "[t]he House refused to acquiesce in a number of amendments made by the Senate, including the [original] Sherman amendment" to H.R. 320. *Id.* at 666.

The original version of the Sherman Amendment placed liability on the "inhabitants of the county, city, or parish" and arguably subjected their property to levy rather than that of the local government. *See id.* This amendment was added to H.R. 320 immediately prior to the Senate's vote on the measure; under the Senate rules, debate was not allowed on it. *Id.*

noted in *Monell*, the Sherman Amendment—which proposed to provide a cause of action against local governments to persons injured in either their person or property by rioters or mobs acting with the intent to deprive them of their civil rights—was the subject of vigorous debate in the House of Representatives which rejected it. *See* 436 U.S. at 666-69.

The principal objection to the Amendment was that it imposed liability on local governments for failing to keep the peace even though under the constitutional doctrine of the era, the federal government had no authority to impose duties on state officers, *see, e.g., Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and even though local governments frequently had not been granted the authority to keep the peace under state law. *See Monell*, 436 U.S. at 673. Numerous lawmakers noted this infirmity in the legislation during the floor debate in the House. For example, Representative Willard stated:

> In most of the States—it is so in mine, I know—the counties and the towns have no power whatever

> in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of the citizens, when perhaps no laws for its protection exist; for not giving me protection when they have not been clothed by the State with the right and power to give me protection?

Cong. Globe, 42d Cong., 1st Sess. 791 (1871). In a similar vein, Representative Poland stated his objection:

> Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them. In a sense they are corporations, but with only such powers and subject to such burdens as the State may deem advisable.

Id. at 794. Representative Blair, to whom the Court in *Monell* attributed the most complete statement of opposition, *see* 436 U.S. at 673, added:

> [The Sherman Amendment] claims the power in the General Government to go into the States . . . and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot . . . tell me where its power will stop and what obligations it might not lay upon a municipality. . . . The State has made these municipalities for certain objects. It has not made them for the purpose of meeting this obligation which the Government of the United States under this bill would seek to interpose and lay upon them . . . .

Id. at 795. And of particular relevance in assessing petitioners' contention that Chambers County should be held liable for the sheriff's actions notwithstanding that the State has not granted it law enforcement authority, are the comments of Representative Burchard:

> . . . there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. . . . But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Id.

As the foregoing demonstrates, the members of the Forty-Second Congress were well aware of the common law principle that local governments possess only the authority which the State has vested in them. Section 1983 must be construed with this principle in mind. The subsequent rejection of the Sherman Amendment—on the ground that the Federal Government could not impose an obligation on local governments where the States themselves had not vested such authority in the local governmental entity—renders unassailable the conclusion that absent a grant of authority from the State to engage in a particular function, a local government does not make policy so as to subject it to *Monell* liability. Put another way, a local government is a "person" only with respect to those powers which the State has vested in it.[5] And as

[5] This construction of the term "person" is also supported by the common law principles applicable to the suability of county governments. Unlike municipal corporations, created with the consent of their inhabitants, counties were created by the State without the consent of their citizenry and thus were considered to be "involuntary quasi corporations." Dillon, *Treatise On The Law Of Municipal Corporations* § 10, at 31 n.1. As such they were viewed as being "purely auxiliaries of the state." *Id.* at 32-33. As Judge Dillon added, "to the general statutes of the state [counties] owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." *Id.* at 33.

Counties were not suable in the same manner as municipal corporations. As Judge Dillon wrote:

> many of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, [with] respect to their liability, to persons injured by their neglect of duty: holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment.

Id. (emphasis in original). *See also id.* at 31-32 n.1 (quoting *Hamilton County v. Mighels*, 7 Ohio St. 109, 118-24 (1857)).

Professor Cooley likewise explained that counties were not "persons" in the same manner as municipal corporations:

> The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated

Justice O'Connor's plurality opinion in *City of St. Louis v. Praprotnik* noted:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies.

485 U.S. 112, 124-25 (1988). The States are not required by either § 1983 or the U.S. Constitution to vest law enforcement authority in county or other local governments. Whether they have done so is a question which must necessarily be resolved before answering the question of whether a particular official is a county's final policymaker. And it is likewise a question of state law on which the court of appeals should receive considerable deference. *Cf. Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989).

Here, the answer is clear. Alabama has granted counties only narrow and defined authority. *See* Ala. Code §§ 11-3-10, 11-3-11 (listing county powers). As this Court has noted, one of the main functions of Alabama

> under general or special laws. As intimated above counties . . . are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of law peculiarly applicable to municipal corporations.

Roger W. Cooley, *Handbook Of The Law Of Municipal Corporations* § 5, at 14 (1914). *See also* Abbott, *A Summary Of The Law Of Public Corporations* § 530, at 529 ("Since the government of a quasi corporation is ordinarily imposed by the sovereign, its business and private relations simple[,] and further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations unless one is expressly imposed by statute.") (footnote omitted); *Soper v. Henry County*, 26 Iowa 264, 268, 270 (1868); *Hedges v. County of Madison*, 6 Ill. (1 Gilm.) 567, 570 (1844).

county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n,* 112 S. Ct. 820, 824 (1992). Alabama county governments' other principal functions are largely limited to the erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority. *See* Pet. App. 33a-34a. The court of appeals' holding that the county was not suable under § 1983 for the sheriff's "policymaking" was therefore correct as a matter of statutory construction.

2. In rejecting the court of appeals' holding that the County cannot be held liable for the Sheriff's activities because it does not have law enforcement authority, neither petitioners nor their *amici* make any attempt to reconcile their expansive view of local government liability with § 1983's text, the common understanding of its meaning, or its legislative history. Instead, petitioners and the United States rely on dictum in *Pembaur* to make the generic argument that its plurality opinion "reflected the common understanding of sheriffs as local policymakers when it stated that 'decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability.'" Pet. Br. 7 (quoting 475 U.S. at 483 n.12) (emphasis and brackets in original); *see also* Br. *Am. Cur.* U.S. 16-18. Indeed, petitioners and the United States read *Pembaur* as establishing a sweeping federal rule that where a sheriff is elected by county residents and receives funding from the county, the sheriff is a county policymaker so as to subject the county to liability for his unconstitutional acts regardless of applicable state law which makes that officer a member of the State's executive department. *See* Pet. Br. 12-17, 20-22; Br. *Am. Cur.* United States 16-18.

Pembaur, however, did not establish as a matter of federal law either a general proposition that a sheriff is

a county policymaker with respect to law enforcement practices, or a more specific proposition that where a sheriff is elected by county voters and receives funding from the county treasury, the sheriff is a county policymaker. Rather, the *Pembaur* plurality stands for only the limited principle that a single decision or act by an official vested with the authority to make local government policy could establish the existence of a policy, a majority of the Court (including the plurality) having relied on the holding of the Sixth Circuit that, under state law, the sheriff was the county's policymaker with respect to law enforcement activities. *See* 475 U.S. at 471, 476, 484-85 (citing *Pembaur v. City of Cincinnati,* 746 F.2d 337, 340-41 (6th Cir. 1984)). And as *amici* explain below, there is no basis for either a uniform federal rule that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law or a rule establishing petitioners' criteria as the test for whether a sheriff exercises county power.

B. In The Absence Of A Grant By The State Of Law Enforcement Authority To The County, A Sheriff Does Not Make County Policy When Enforcing State Law

According to petitioners, it "simply cannot be the case" that a county sheriff makes law enforcement policy for the State rather than the county itself. *See* Pet. Br. 17. Noting the derivation of the term sheriff from the Saxon words "scyre" (as in shire or county) and "reve" (for keeper), petitioners assert that "sheriffs traditionally have been considered county policymakers and the chief law enforcement officers not for their states, but for their counties." *Id.* at 18.

The authorities petitioners rely on, however, do not establish anything more than that sheriffs exercise their powers within the boundaries of a county. *See id.* at 18-19. But this truism certainly does not answer the question of whose authority the sheriff exercises in enforcing state law. Moreover, it is impossible to reconcile

petitioners' assertion that sheriffs have traditionally exercised county authority (and therefore make county policy) with the Forty-Second Congress' rejection of the Sherman Amendment on the grounds that many units of local government had not been granted authority to keep the peace. *See Monell*, 436 U.S. at 673-81; *see also supra* pp. 10-14. Indeed, it is ironic that petitioners note the Saxon derivation of the term "sheriff" while ignoring more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority.

As several leading commentators noted well before the enactment of § 1983, "[t]he sheriff is an officer of very great antiquity." 1 William Blackstone, *Commentaries On The Laws Of England* 339 (George Sharswood ed. 1904); *see also* William Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts, Courts-Leet And Courts-Baron* 2 (8th ed. 1722); Michael Dalton, *The Office And Authoritie Of Sherifs* folios 2-3 (photo. reprint 1985) (1623).[6] As "one of the oldest offices known to the common law system of jurisprudence," 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 1, at 2 (1941), the office of the sheriff was among those English institutions which the American colonists adopted in settling this country. *See* C.R. Wigan & Dougall Meston, *Mather On Sheriff And Execution Law* 15 (3d ed. 1935).

Thus, in this country, the office of the sheriff was well established at the time of § 1983's enactment. *See, e.g.*, Cong. Globe at 795 (Statement of Rep. Burchard); 2 *Bouvier's Law Dictionary* 518 (1868); John G. Crocker,

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[6] The origin of the office is generally attributed to Alfred the Great (848-900 A.D.), who divided England into shires or counties. Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts* at 2; Dalton, *The Office And Authoritie Of Sherifs* at folio 2. Sir Edward Coke, however, attributed the office to the Romans. 1 Edward Coke, *Institutes Of The Laws Of England* § 248, at 168a (1st Am. ed. 1853).

The Duties Of Sheriffs, Coroners And Constables § 1, at 1 note a (2d ed. 1871) (compiling state laws regarding the election, qualification and entering upon duty of sheriffs). It was likewise common parlance to describe the sheriff as "a conservator of the peace within his county," Crocker, *The Duties Of Sheriffs* § 25, at 18, or as "the chief executive officer of the county." Charles W. Hartshorn, *The New England Sheriff* 13 (2d ed. 1855).[7]

Sheriffs were thus required to carry out the very obligation which the Sherman Amendment would have imposed on local governments. *See* Crocker, *The Duties Of Sheriffs* § 25, at 18; Perley, *The Maine Civil Officer* at 51-53; James Ewing, *A Treatise On The Office And Duty Of A Justice Of The Peace, Sheriff, Coroner, Constable, And Of Executors, Administrators, And Guardians* 538 (3d ed. 1839); Hartshorn, *The New England Sheriff* at 239-42; *The Conductor Generalis* at 377. Moreover, in performing the duty to preserve the peace, the sheriff was authorized by both statutory and common law to invoke the *posse comitatus*, that is, to require the adult citizens of the county to assist in the suppression of riots and the apprehension of criminals. 1 Anderson, *A Treatise On The Law Of Sheriffs* § 141, at 137-39, § 143, at 139; Charles R. Morrison, *Justice And Sheriff* 430 (1872); *The Conductor Generalis* at 377; Perley, *The Maine Civil Officer* at 52-53; Hartshorn, *The New England Sheriff* at 239-42; Blackstone, *Commentaries On The Laws Of England* at 343.

Notwithstanding the duties and extraordinary powers of the sheriff's office, the members of the Forty-Second Congress rejected the Sherman Amendment on the

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[7] *See also* 2 *Bouvier's Law Dictionary* at 518; Edward R. Olcott & Henry M. Spofford, *The Louisiana Magistrate, And Parish Officer's Guide* 208 (1848); Jeremiah Perley, *The Maine Civil Officer* iii-iv (1825); *The Conductor Generalis: Or, The Office, Duty And Authority of Justices Of The Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-Men, And Overseers Of The Poor* 377 (1801).

ground that it imposed on local governments the obligation to keep the peace when they had no such authority under state law. The only plausible explanation for this is that, at least when enforcing state law, the sheriff exercised the authority of the sovereign itself and not the county. This was, and remains, the common understanding of the source of the sheriff's authority. *See* 1 Anderson, *A Treatise On The Law Of Sheriffs* § 6, at 5 ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State."); Cooley, *Handbook Of The Law Of Municipal Corporations* § 170, at 512 ("Sheriffs . . . and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county[.]"); 2 *Bouvier's Law Dictionary* at 518 (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").[8]

Sheriffs were commonly constitutional officers of the State, *see, e.g.*, Crocker, *The Duties Of Sheriffs* § 1, at

[8] The understanding in this country that sheriffs exercise state authority is simply a continuation of the common law understanding. As a leading authority states, "the Sherife though he be still called Vicecomes [vice-earl], yet all he doth, and all his authoritie is immediately from and under the king, and not from or under the Earle." Dalton, *The Office And Authoritie Of Sherifs* at Fol. 2. As Dalton explained, "the high Sherife (Vicecomes) is an officer of great antiquitie, and of great trust and authoritie, having from the king the custodie, keeping, and command, of the whole Countie committed to his charge and care." *Id.* at Fol. 3. *See also* Greenwood, *The Authority, Jurisdiction And Method Of Keeping County-Courts* at 2.

Blackstone likewise described the sheriff as "do[ing] all the king's business in the county," 1 Blackstone, *Commentaries On The Laws Of England* at 339, and noted that "[a]s the keeper of the king's peace," the sheriff "may apprehend, and commit to prison, all persons who break the peace . . . and may bind any one in recognizance to keep the king's peace" and is "to defend his county against any of the king's enemies." *Id.* at 343 (footnote omitted).

1 & n.1; La. Const. art. 83 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 310); *Hartshorn, The New England Sheriff* at 14; Ewing, *Office And Duty* at 513; Perley, *The Maine Civil Officer* § 1, at 2, and remain so in several States today. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27; Md. Const. art. IV, § 44. Before entering upon the duties of the office, the sheriff was commonly required to enter into a surety bond with the State "for the faithful execution of [the] office." Ewing, *Office And Duty* at 514; *see also* 2 Anderson, *A Treatise On The Law Of Sheriffs* at 709; Crocker, *The Duties of Sheriffs* at 503; Hartshorn, *The New England Sheriff* at 15; Perley, *The Maine Civil Officer* at 3. Sheriffs were also commonly subject to removal from office through either the State's impeachment procedure or removal by the governor, or both. *See* Crocker, *The Duties Of Sheriffs* § 10, at 8-9; Hartshorn, *The New England Sheriff* at 7; La. Const. art. 88 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 311); Perley, *The Maine Civil Officer* at 7; Ala. Const. art. VII, §§ 173-74; 2 *Bouvier's Law Dictionary* at 518.[9]

As the foregoing demonstrates, sheriffs traditionally have been viewed as being state officers who exercise the State's sovereign authority. This was likewise the understanding of the Forty-Second Congress. It is still the case with respect to Alabama, which has made its sheriffs constitutional officers of the State's executive department, *see* Ala. Const. art. V, § 112, who are required to investigate violations of law "whenever directed to do so . . . by the attorney general or governor," Ala. Code § 36-22-5,

[9] That sheriffs are frequently termed "county officers" does not alter the source of the authority they exercise. As one of the authorities cited by petitioners notes, "[a]s a general rule, the sheriff answers to the attorney general for his activities even though the constitutions and statutes list him as a county officer with his compensation provided by the governing body in the particular county." George T. Felkenes, *The Criminal Justice System: Its Functions And Personnel* 55 (1973).

and must submit written reports "under oath . . . on any subject, relating to the duties of their . . . offices," when required by the Governor. Ala. Const., art. V, § 121.

Moreover, under the Alabama Constitution, sheriffs are subject to impeachment for the same offenses (including the willful neglect of their duties) as are other state officials such as the Governor and Attorney General. *See id.* § 112; art. VII, §§ 173-74. Consistent with the view that Alabama sheriffs exercise state authority, the Governor has the authority to initiate an impeachment proceeding against the sheriff which is prosecuted by the Attorney General and heard by the state Supreme Court. *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). Alabama's sheriffs thus are at all times accountable to state authority. This stands in stark contrast to the procedure used for the removal of county officers such as members of the board of commissioners and other local officials, which provides for a jury trial in various "court[s] of the county in which such officers hold their office," Ala. Const. art. VII, § 175, and effectively vests removal authority in the local populace.

None of the factors which petitioners and their *amici* rely upon to argue that the sheriff exercises county authority, e.g., the method of selection, funding or jurisdiction of the office, alters the fact that Alabama's sheriffs are constitutional officers of the State who, in enforcing state law, exercise state authority. Contrary to the assertions of petitioners and their *amici* that because sheriffs are elected by the residents of a county they exercise county authority, *see* Pet. Br. 20-21; Br. *Am. Cur.* Lawyers' Committee 16-17, the selection of the sheriff through popular elections does not alter the nature of the office's authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* at 518. *See also* Crocker, *The Duty Of Sheriffs* § 1, at 1; Ewing, *Office And Duty* at 513; Olcott & Spofford, *The Louisiana Magistrate* at 208; *see*

also Cong. Globe at 795 (Rep. Burchard). But as the members of the Forty-Second Congress recognized, sheriffs did not exercise the authority of their counties but rather that of their States. At most, the popular election of sheriffs might establish an element of a claim of *respondeat superior* liability (which is not cognizable under § 1983, *see Monell*, 436 U.S. at 694). But it certainly does not establish that a sheriff exercises county authority and makes county policy.

In any event, petitioners' (and their *amici*'s) contention that sheriffs exercise county authority because they are elected by the county's voters is refuted by the provisions of the Alabama Constitution which make sheriffs officers of the State's executive department who remain accountable to the Governor and Attorney General through the mechanism of impeachment. *See* Ala. Const. art. V, § 112; art. VII, §§ 173-74. While petitioners and the United States ignore the existence of the various provisions of Alabama law which place sheriffs in the State's executive department and hold them accountable to the State through the mechanism of impeachment, these provisions of Alabama law compellingly demonstrate that sheriffs are state officers who exercise the authority of the State itself and not the County.[10]

Petitioners and their *amici* also place much stock in provisions of Alabama law which require that counties pay the salary and expenses of the sheriff. *See* Pet. Br.

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[10] Impeachment proceedings have been invoked on numerous occasions. There are five reported instances in which the State has sought to impeach sheriffs. *See State v. McPeters*, 56 So.2d 102 (Ala. 1951); *State v. Baggett*, 41 So.2d 584 (Ala. 1949); *State v. Jinwright*, 55 So. 541 (Ala. 1911); *State v. Latham*, 61 So. 351 (Ala. 1910); *State v. Cazalas*, 50 So. 296 (Ala. 1909). These decisions by no means represent the total number of impeachment proceedings because the Alabama Supreme Court stopped issuing opinions in these cases more than forty years ago. *See McPeters*, 56 So.2d at 103-04. Nor do they account for those instances in which sheriffs have resigned their offices when threatened with impeachment proceedings.

12-13, 15, 17; Br. *Am. Cur.* United States 13-15. But it hardly follows, as the United States argues, that for these reasons "the county government is properly viewed as having authority in regard to county law enforcement activities for purposes of Section 1983." Br. *Am. Cur.* U.S. 9; *see also* Pet. Br. 15 ("county officials other than the sheriff do have law enforcement responsibilities in the sense that the county actually pays for the office, the operating expenses, and the salary of the sheriff"). Not only does this argument erroneously equate the County's funding obligations with a grant of authority, it ignores their ministerial nature.[11]

It likewise proves too much because the States, including Alabama, have long vested in their sheriffs numerous

[11] Certainly history suggests that the source of the office's funding is not probative of the source of the sheriff's authority. As a leading treatise notes, "At ancient common law, the sheriff . . . [was] not entitled to any compensation whatever . . . ." 2 Anderson, *A Treatise On The Law Of Sheriffs* § 706, at 673; *see also* George Atkinson, *A Treatise On The Offices Of High Sheriff, Undersheriff, Bailiff* 267 (6th ed. 1878). Indeed, "[i]t is well known that in the Tudor or Stuart period [1485-1714] the king had the sheriff's services at practically no cost to himself." William A. Morris, *The Medieval English Sheriff To 1300* 283 (reprint 1968) (1927). In the absence of funding from the sovereign itself, sheriffs and their offices were supported by the residents of the county through "the *ferm* [rents] of the shire," *id.* at 282-83, and through the collection of fees, both legal and illegal, for their services. *Id.* Thus, "[t]he burden was in various ways shifted to the men of the vills and hundreds." *Id.* at 283-84.

Notwithstanding that the sheriff's office was funded by residents of the county, the sheriff clearly exercised the authority of the King. *See* 1 Blackstone, *Commentaries On The Laws Of England* at 339, 343-44; Greenwood, *The Authority, Jurisdiction and Method of Keeping County-Courts, Courts-Leet and Courts-Baron* at 2; Dalton, *The Office And Authoritie of Sherifs* at Folios 1-3. While with the decline of the feudal system, the sheriffs were increasingly supported by fees paid for by various sources for the numerous services they performed, *see* Ewing, *Office And Duty* at 542-44; Morrison, *Justice And Sheriff* at 371; Perley, *The Maine Civil Officer* at 69-74, these fees likewise did not alter the settled understanding that the sheriff exercised the sovereign's authority.

duties, many of which unquestionably involve the exercise of state authority. As one leading treatise explains:

> [I]t is his duty, when required, to execute all criminal process, judgments and orders of every court or officer having criminal jurisdiction in this state. . . . He is also required to serve the subpoenas of district attorneys of other counties, upon witnesses in his own county . . . .
>
> In civil matters, the sheriff is the immediate officer of every court of record in the state . . . to whom all writs and process are regularly directed, and he is bound to execute the same. He is to serve the writ or order for arrest, and take bail, summon the jury, and through him the court enforces obedience to its orders and punishes for contempts; and when a cause is determined, he sees that the judgment of the court is carried into effect. He may hold courts to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and to inquire into any claim of property seized or levied on by him . . . .

Crocker, *The Duties Of Sheriffs* §§ 25-26, at 18-19; *see also* Olcott & Spofford, *The Louisiana Magistrate* at 215-51; Hartshorn, *The New England Sheriff* at 18-24, 36-277; Ewing, *Office and Duty*, at 519-42; Perley, *The Maine Civil Officer* at 25-68.

In Alabama, the sheriff's duties are equally broad in scope. Thus, in addition to "ferret[ing] out crime," Ala. Code § 36-22-3(4), the sheriff must "execute and return the process and orders of the courts of record of th[e] state and of officers of competent authority . . . ." *Id.* § 36-22-3(1). The sheriff is also required to attend the various courts "held in [the] county" and "obey the lawful orders and directions of such courts." *Id.* § 36-22-3(2). If petitioners and their *amici* are correct in their assertions that the county's funding of the office of the sheriff establishes that the county has law enforcement authority, then it likewise establishes that the county

exercises authority with respect to the execution and return of the process issued by the State's courts, its agencies and officials, or in the carrying out of other judicial orders.

But it can hardly be the case that a sheriff makes county policy when he unconstitutionally serves a complaint or writ of attachment in a civil matter between two private parties. Nor can it be the case that a sheriff makes county policy when he unconstitutionally enforces a subpoena issued by a state agency or legislature. The county, being an artificial person with only those powers granted to it by the State, *Fertilizing Co.*, 97 U.S. at 666-67; *Railroad Co.*, 79 U.S. (12 Wall.) at 81; Dillon, *The Law Of Municipal Corporations* § 9, at 29, has no authority over such matters, *see* Ala. Code § 11-3-11, and cannot reasonably be viewed as having any policy with respect thereof. Likewise, under Alabama law, law enforcement is simply not the county's business. That the court of appeals did not "identif[y] any official or body *outside* the county 'that has the responsibility for making law or setting policy' " in the area of law enforcement, see Br. *Am. Cur.* Lawyers' Comm. 14, or that it "never identified whose policy it is" that the sheriff makes, *see* Pet. Br. 17, is easily explained. Under Alabama law, sheriffs are constitutional officers of the State. That the State assigns them a jurisdictional boundary on the basis of county lines as a matter of tradition and administrative convenience is of no relevance in determining whether the corporate entity of the county exercises law enforcement authority.[12]

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[12] Petitioners and their *amicus*, Lawyers' Committee, also point to the existence of the Alabama Highway Patrol to argue that "where the sheriff has full law enforcement authority within the county and the statewide law enforcement responsibility belongs to the state police, it is totally wrong to suggest that the sheriff sets policy for the state." Pet. Br. 19; *see also* Br. *Am. Cur.* Lawyers' Comm. 7-8 (arguing that "Alabama law itself clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol through its state troopers, and county law enforcement authority, which is conducted by county sheriffs").

The suggestion that the existence of the state police renders the sheriff a county policymaker (who exercises county authority) is, however, a non sequitur and is refuted by more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. *See supra* pp. 18-21 & n.6. Consistent with this understanding, Alabama has made its sheriffs constitutional officers of the State's executive department subject to impeachment at the initiation of the Governor and Attorney General.

The comparatively recent creation of state police forces (a post World War I development) does not alter this understanding. That the advent of the automobile and its attendant problems, i.e., traffic safety and theft, and the ease with which criminals could cross jurisdictional boundaries, *see* John A. Humphrey & Michael E. Milakovich, *The Administration Of Justice: Law Enforcement, Courts, and Corrections* 42 (1981), led States such as Alabama to establish state police forces, does not alter the source of the sheriff's authority. The States are not prohibited from vesting their sovereign authority in more than one institution of state government.

There is likewise no merit to petitioners' and their *amici*'s contention that Alabama's sheriffs make county policy because "their decisions are final and unreviewable within their counties . . . ." Pet. Br. 13; *see also id.* 18; Br. *Am. Cur.* United States 17-18 (criticizing *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990)). That Chambers County's board of commissioners or its other officials do not have the authority to review the decisions of the sheriff does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority and to make sheriffs constitutional officers of the State's executive department. Sheriffs could hardly vindicate the State's sovereign interests if their activities were subject to review by local officials.

It is simply erroneous to suggest, as *amici* Lawyers' Committee does, that Chambers County must be responsible because the court of appeals "identifie[d] no state executive official with any responsibility for supervising

or disciplining" the sheriff. *See* Br. *Am. Cur.* 14. As explained above, the Alabama Constitution gives the Governor and Attorney General the power to supervise and discipline errant sheriffs through the authority to institute impeachment proceedings and require sworn written reports on their activities. *See supra* pp. 21-22. Likewise, the Alabama Constitution vests "[t]he supreme executive power of th[e] state" in the Governor, Ala. Const. art. V, § 113, and necessarily grants the Governor authority over subordinate officers such as sheriffs. *See id.* § 112. Even if it is the unlikely case that a sheriff, as a subordinate officer, could fail to obey the Governor's lawful orders without being impeached for the willful neglect of duty, *see id.* art. VII, §§ 173-74, this alone does not render the sheriff a non-member of the State's executive department. There is nothing unusual about a government structuring its executive branch in a manner that limits the chief executive's authority to control or supervise subordinate or inferior officers. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Finally, petitioners' suggestion that "if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as 'state officials,' § 1983 would easily be thwarted," Pet. Br. 13, is mistaken for several reasons. First, as discussed above, Alabama has done far more than label its sheriffs as state officials. Rather, it has made them accountable to the State by subjecting them to an impeachment procedure initiated by the Governor and Attorney General and adjudicated by the state Supreme Court.

Second, Alabama has not made its sheriffs state officials in order to insulate counties from § 1983 liability. As the Alabama Supreme Court's opinion in *Parker* explains, the State's constitutional provisions which made sheriffs executive officers of the State and subjected them to impeachment were enacted in 1901, sixty years before this Court revived § 1983 in *Monroe* and nearly eighty

years before *Monell* overruled *Monroe* with respect to the suability of local governments as "persons" under the statute. *See* 519 So.2d at 443-44.

Third, affirmance of the court of appeals' decision does not "derail" the intent of the Forty-Second Congress or "thwart" the purpose of § 1983. *See* Pet. Br. 13. To the contrary, as explained above, the Forty-Second Congress specifically rejected the imposition of liability on local governments where the States had not granted them authority to act. *See supra* pp. 10-14. Likewise, the Forty-Second Congress specifically rejected the imposition of liability on the States themselves. *See Will*, 491 U.S. at 71. And consistent with these principles, it likewise rejected the imposition of Sherman Amendment liability on county governments notwithstanding the existence of the sheriff's office because it recognized that in enforcing state law, sheriffs exercised state and not county authority. *See supra* pp. 10-14. Petitioners' true objection then is not with the court of appeals for "never identif[ying] whose policy it is" that the sheriff makes. *See* Pet. Br. 17. Rather, it is with the Forty-Second Congress for failing to subject the States themselves to suit.

Fourth, as a leading authority has noted, "states do not order their affairs with future federal litigation in mind, but with a practical appreciation for what seems workable and appropriate." Charles F. Abernathy, *Civil Rights And Constitutional Litigation* 349 (2d ed. 1992). On the other hand, States limit the revenue raising authority of local governments in accordance with the other powers which they have granted them. 4 Chester J. Antieau & John M. Antieau, *Antieau's Local Government Law* §§ 41.00, 41.02, 41.05 (1993); 4 C. Dallas Sands *et al.*, *Local Government Law* § 23.02 (1993). Indeed, "even a broad grant of home-rule powers does not convey . . . autonomy with respect to taxation." 4 Sands, *Local Government Law* § 23.02; *cf.* Advisory Commission On Intergovernmental Relations, *State Constitutional and Statutory Restrictions upon the Structural, Functional, and*

Personnel Powers of Local Government 34 (1962). County governments likewise have only limited power to go into debt. 4 *Antieau's Local Government Law* § 42.00. Imposing the damage award on respondent which petitioners seek—a $1 million award, where, in the fiscal year ending September 30, 1993, the County had total revenues of only $6 million, *see* State of Alabama, Department of Examiners of Public Accounts, *Financial Statement: All Counties* 24 (1994)—would have grave consequences for the County and its ability to provide the services required by law. It was this very type of situation which led the Forty-Second Congress to reject the expansive notion of liability which petitioners ask this Court to impose.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

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